

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal of the Denial of
Determination of Need for Opportunity
Services Community Living Program

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Barbara Case at approximately 9:30 a.m. on February 25, 2014, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota.

Cynthia B. Jahnke, Assistant Attorney General, appeared on behalf of the Department of Human Services (Department). Mary K. Martin, Law Office of Mary K. Martin, appeared on behalf of Opportunity Services.

Stephen N. Betcher, Goodhue County Attorney, was also present as counsel for Goodhue County.

The record closed on April 9, 2014, upon the filing of closing arguments from both parties.

STATEMENT OF ISSUE

Whether the Department properly denied Opportunity Services' Application for a Determination of Need for the Development of a New Day Training and Habilitation Program (Application), pursuant to Minn. Stat. §§ 252.28 and 252.41, and Minn. R. 9525.1210 and 9525.0036.

SUMMARY OF CONCLUSION

Opportunity Services has failed to show, by a preponderance of the evidence, that the Department improperly denied its Application for a new program and that the Department should approve the Application or review its denial. The Department demonstrated that it gave due consideration to Opportunity Services' Application for a new program in Goodhue County, but that all indications were that the request was actually for a rate increase in order to increase staffing levels at an existing program and that, therefore, the Department was required by law to deny the request.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Background

1. On November 29, 2012, Goodhue County Health and Human Services submitted Opportunity Services' Application to the Department on behalf of Opportunity Services.¹

2. Approval of the Application would have resulted in the approval of the program as well as approval of a corresponding set of higher payment rates.²

3. On February 21, 2013, the Department denied Goodhue County's and Opportunity Services' Application and the corresponding set of service rates. By means of the same letter, the Department notified Opportunity Services of its right to appeal the Department's decision under Minn. Stat. § 256B.0643 and Minn. Stat. ch. 14.³

4. On March 15, 2013, Opportunity Services appealed the Department's denial and requested a contested case hearing under Minn. Stat. § 256B.0643 and Minn. R. 9525.0036.⁴

5. The Department issued a Notice and Order for Hearing to Opportunity Services and Goodhue County Social Services on August 15, 2013.⁵

6. The issue for hearing was whether the Department properly denied Opportunity Services' Application pursuant to Minn. Stat. §§ 252.28 and 252.41 and Minn. R. 9525.1210 and 9525.0036.⁶

7. Pursuant to the Notice and Order for Hearing and subsequent agreement of the parties, a hearing was held on this matter on February 25, 2014.

8. The record closed on April 9, 2014, when, according to their agreement, the parties submitted written closing statements in this matter.

¹ Ex.1.

² Exs. 1 and 3.

³ Ex. 4.

⁴ Ex. 5.

⁵ Notice and Order for Hearing.

⁶ *Id.*

Factual Background

9. Opportunity Services is a Minnesota non-profit corporation that is licensed to provide day training and habilitation (DT&H) services to persons with developmental disabilities under Minn. Stats. §§ 245A to 245A.16 and 252.28, subd. 2.⁷

10. DT&H services are defined as health and social services that are provided to a person with a developmental disability by a licensed provider at a site other than the person's place of residence unless medically contraindicated and documented as such in the individual service plan. The services must be designed to result in the development and maintenance of life skills, including: self-care, communication, socialization, community orientation, emotional development, cognitive development, motor development, and therapeutic work or learning activities that are appropriate for the person's chronological age. Day training and habilitation services are provided on a scheduled basis for periods of less than 24 hours each day.⁸

11. DT&H services are further defined as services for adults with developmental disabilities that include supervision, training, assistance and supported employment, work-related activities, or other community-integrated activities designed and implemented in accordance with the individual service and individual habilitation plans to help an adult reach and maintain the highest possible level of independence, productivity, and integration into the community.⁹

12. Opportunity Services currently operates a DT&H program in Goodhue County. The program serves approximately 27 individuals.¹⁰ Opportunity Services strives to provide services that, among other objectives, are designed and delivered to affirm individuals' dignity, promote community inclusion and self-sufficiency, promote social relationships and provide individual choice.¹¹

13. Upon the application from a host county, the Department of Human Services makes determinations regarding the need for the development of licensed services, including DT&H services, under Minn. R. 9525.0036.

Opportunity Services' Application for a New Program

14. On October 10, 2012, Opportunity Services completed its Application for a need determination of services requesting licensure for a new DT&H program. The Application was approved by Goodhue County's Board Chairperson on November 20, 2012 and was forwarded to the Department by Goodhue County Health and Human Services by letter dated November 29, 2012.¹²

⁷ Testimony of Dean Ritzman and Ex. 1.

⁸ Minn. Stat. § 252.41, subd. 3 and Minn. R. 9525.1210, subp. 7 (2013).

⁹ Minn. Stat. 252.41, subd. 3

¹⁰ Test. of Jacob Schuller.

¹¹ Test. of D. Ritzman.

¹² Ex. 1.

15. A section of the Application titled “background information” stated in its entirety:

Opportunity Services currently has a DTH program serving 24 people. Fourteen of those current consumers are targeted for a new program that will be served at a higher staffing ratio. This program will be utilizing a Community Living Program (CLP) program model that Opportunity Services has shown very successful in other counties.

The CLP program will provide increased staffing supports to these consumers in daily activities and personal care. This increased support will assist in increasing the level of community access and engagement throughout their day. The CLP program will provide the consumers with meaningful activities such as cooking, crafts, current events, sensory activities and many more activities. The consumers will access their communities on a weekly basis to participate in a variety of activities. Many of the activities in both the facility and community are chosen either by the consumers or due to an interest expressed by the consumer. Providing the consumers with a more predictable, structured day will decrease the level of idle time and behavioral concerns.¹³

16. This description of the proposed program and of whom it was intended to serve has been consistent from the time of the Application through this appeal.

17. The services and activities that the proposed program would provide appear to be identical to the services and activities being delivered through the current program.¹⁴

18. The consumers to be served at the proposed program are consumers currently served by Opportunity Services.¹⁵

19. The building in which the services of the proposed program would be delivered is the building in which the current program is housed.¹⁶

20. The difference between the proposed program and the current program is that the proposed program’s higher rates would allow Opportunity Services to provide more consistent staffing which would result in an increased number of community outings.¹⁷

¹³ *Id.* at 18.

¹⁴ Ex. 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Ex. 1 and Test. of J. Schuller.

21. The current program rates are 62.68 per day per client. The rates for a full day at the proposed program are 81.08 per client.¹⁸

22. As of February 25, 2014, Opportunity Services' Vice President Jacob Schuller estimated that the current program serves 27 people and that 14 of those 27 would be served by the proposed Community Living Program which was the subject of the Application.¹⁹

23. These 14 people have a greater need for individualized supportive services than do the other 13 people served by Opportunity Services in Goodhue County.²⁰

24. Under Minn. Stat. § 245B.055, now repealed but in place at the time of the Application, individuals are determined to need a certain level or ratio of staff to individual depending on the level of care they require and on their need for behavior management. Of the 14 people who were the subject of the Application, eight required a staffing ratio of one staff person to four consumers, four required a ratio of one-to-six, one required a staffing ratio of one-to-eight and for one no staffing ratio information was received into evidence.²¹ One of the individuals assessed as needing a one-to-six staffing ratio might be more properly classified as requiring a one-to-four staffing ratio due to deterioration of her abilities caused by aging.²²

25. While some of the consumers require a staffing ratio of one-to-four due to personal needs such as feeding, the majority require that staffing ratio because of behavioral concerns such as the propensity for elopement, potential for assaultive behavior or a history of self-injurious behavior.²³

26. The others served by Opportunity Services in Goodhue County are consumers working in enclave style work settings. For example, these people work, with support from Opportunity Services staff, in the kitchen or in housekeeping at a local casino.²⁴

27. If, on any given day, Opportunity Services is short-staffed, reassignments are made to ensure adequate staffing at business work sites. This is done to protect the ongoing visibility of the program. If adequate staffing is not in place to support the disabled persons in the workplace, businesses may opt out of the program.²⁵

28. When the optimal number of staff for the higher need individuals is not available, the opportunity for outings in the community is reduced because staff is not

¹⁸ Ex. 3.

¹⁹ Test. of J. Schuller.

²⁰ *Id.*

²¹ Exs. A-M.

²² Test. of Lisa Foxen.

²³ Exs. A-M.

²⁴ Test. J. Schuller

²⁵ *Id.*

available to take care of situations that might arise given the various behaviors of concern.²⁶

29. The purpose of the Application for a new DT&H was to enhance staffing and thus provide more consistent opportunities for community integration for the 14 people who are not currently working in the community.²⁷ The additional funding that would come with the approval of the new program would allow Opportunity Services to hire additional staff so that the consumers not on the work sites would not miss opportunities that require the higher staffing ratio.

30. The Department has approved Opportunity Services' CLP program in at least two other counties.²⁸

31. The facts underlying the Department's approval of the CLP programs in the other counties were different than the facts presented here. In one county the Department approved the CLP program because Opportunities Services was operating a program that, while needed, was invalidly structured and invalidly billing. The approval of the CLP program was made in order to provide the necessary services in a legal manner. In the other county, the individuals being considered for the CLP program were not all Opportunity Service's consumers as is the case here. Instead, that county was looking for new placements for people inadequately served by other programs.²⁹

Department Denial

32. The Department must consider seven factors when reviewing an application for a determination of need.³⁰

33. The Department's February 21, 2013 denial letter to the County addressed four areas of concerns. The letter did not specifically correlate its areas of concerns to the seven factors set forth in the rule.³¹

34. The first concern listed by the Department was that the needed staff supervision ratio arrangements of 1:4 or 1:4.5 for the 14 designated people do not appear to be above and beyond the required staff supervision ratio arrangements in Minn. Stat. § 245B.055, subd. 4.³²

35. The Department further explains this concern by noting that the staffing ratio proposed in the Application is the same, or very close to, the staffing ratio that exists in the current program.³³

²⁶ *Id.*

²⁷ *Id.*

²⁸ Test. Of J. Schuller

²⁹ Test. of D. Ritzman.

³⁰ Minn. R. 9525.0036, subp. 2 A-G.

³¹ Ex. 4, at 31.

³² *Id.*

³³ Ex. 3, at 5.

36. The second concern addressed by the letter was that the proposed DT&H services, activities and supports, as described in the Application, did not appear to be more comprehensive or beyond the scope of a typical DT&H service.³⁴ The Application describes activities, services and supports for the proposed program that are the same or similar to the activities, services and supports in the current program.³⁵ Generally, the activities at the current and proposed program are non-vocational center-based activities, recreation, leisure, community involvement outings and sensory activities.³⁶

37. The third concern addressed by the letter was that the reported personal self-care support and skill assistance for the designated 14 people did not seem to be above and beyond the scope of a typical DT&H service.³⁷

38. The fourth concern addressed by the letter was that the 14 people designated for the proposed program would remain in the same facility or building and receive services from their current DT&H service provider.³⁸ The proposed program would operate for the same number of service days as does the current program.³⁹

39. Where the Department did not address one of the seven factors in the denial letter, it was because the Department believed that Opportunity Services either met that factor or that the factor was not at issue.⁴⁰ For example, the Department's letter did not address whether the provider has the overall administrative, financial, and programmatic capability to develop, provide, and maintain the services that are proposed because the Department had no concerns about Opportunity Services' capacity in that regard.⁴¹

40. The denial letter suggested that Opportunity Services apply for a special needs rate exception for people that need services and supports above and beyond the usual and customary programs and services provided by a DT&H.⁴²

41. The denial letter also suggested that Opportunity Services consider establishing an adult day care program designed to address the services that the 14 individuals require and that the licensing capacity of the current DT&H be reduced from 60 closer to the 24 people being served.⁴³

³⁴ *Ex. 4, at 31.*

³⁵ *Ex. 1.*

³⁶ *Ex. 3 at 5 and Test. of J. Schuller.*

³⁷ *Ex. 4, at 31.*

³⁸ *Id.*

³⁹ *Test. of T. Schuller*

⁴⁰ *Ex. 4; Test. of D. Ritzman*

⁴¹ *Test. of D. Ritzman.*

⁴² *Ex. 4.*

⁴³ *Id.*

42. The particular rate exception process referenced in the denial letter is no longer available due to changes in Minnesota law. However, there is a new process for applying for a rate increase.⁴⁴

Minnesota Statutes section 252.46 (2012)

43. The Department also expressed concern that the Application was in violation of Minn. Stat. § 252.46, subd. 4 (2012). The Department interpreted that statute to mean that a service provider could not take existing consumers and ask for a higher rate albeit in a new program.⁴⁵

44. Minn. Stat. § 252.46 (2012), now repealed but in place at the time of the application, prohibits development of a new program that primarily results in refinancing of services for individuals already receiving services in existing programs.⁴⁶

45. The Department asserts that Minn. Stat. § 252.46 (2012) is an absolute bar to its approval of the Application.⁴⁷

46. Opportunity Services counters that the Department's position is inconsistent with the intent of the law and that it cannot be that the law requires providers to provide age and need appropriate services to consumers at the same cost forever.⁴⁸

47. The Department's denial letter did not cite Minn. Stat. 252.46 (2012) as a basis for the Department's denial of the application.⁴⁹

48. In the denial letter, the Department offered to assist the County and Opportunity Services to effectively meet the needs of the 14 people the Application was intended to positively impact by providing a more consistent and higher staffing ratio. To this end, the letter invited both parties to schedule a telephone conference call with the Department.⁵⁰

CONCLUSIONS OF LAW

The Application and Denial

1. As the party proposing that certain action be taken, the burden of proof in this matter is on Opportunity Services to show, by a preponderance of the evidence,

⁴⁴ Test. of D. Ritzman.

⁴⁵ Test. of D. Ritzman.

⁴⁶ Minn. Stat. § 252.46, subd. 4(b) (2012).

⁴⁷ Department closing argument, at 6.

⁴⁸ Opportunity Services, closing argument, at 4.

⁴⁹ Department Response to Motion for Summary Disposition, at 5.

⁵⁰ Ex. 4 at 32.

that the Department improperly denied its Application for a new program and to demonstrate that the Department should approve the Application or review its denial.⁵¹

2. In order to develop new services, a host county shall apply for a determination of need by the Commissioner upon identifying the need to develop new services, among other potential actions.⁵² In applying for the determination of need, the host county must use information from the individual service plans of persons for whom the county is financially responsible and shall consider the community social services plan, waiting lists, screenings, and other sources which identify unmet needs for services.⁵³

3. The Application in this case did use information from the individual service plans of those to be served by the proposed program. However, there was no information in the Application about the community social services plan, waiting lists, screenings or other information about unmet needs for services.⁵⁴ The Application focused on the needs of those currently served.⁵⁵

4. The Department must consider seven factors when reviewing an application for a determination of need.⁵⁶ These factors are whether:

- a. the proposed service, including size of the service, relates to the needs of the persons to be served;
- b. cost projections for the proposed service are within the fiscal limitations of the state;
- c. the distribution of and access to the services throughout the state are based on current or projected demographics, and do not contribute to excessive concentration of services;
- d. the provider has the overall administrative, financial, and programmatic capability to develop, provide, and maintain the services that are proposed;
- e. the application is in compliance with applicable state and federal law and with the state plan;
- f. the proposed service is consistent with the goals under part 9525.0008, subpart 3; and
- g. the proposed service furthers state policy of access to residences and employment services typical of the general population.

⁵¹ Minn. R. 1400.7300, subp. 5.

⁵² Minn. R. 9525.0036, subp. 1 A.

⁵³ Minn. R. 9525.0036, subp. 1.

⁵⁴ Ex. 1.

⁵⁵ *Id.*

⁵⁶ Minn. R. 9525.0036, subp. 2 A-G.

5. Minn. R. 9525.0036 states that the Department must consider the seven factors but does not specifically direct the Department to address each factor in writing. The Department followed the process set forth in the rule when it considered Opportunity Services' Application and responded by documenting four specific concerns regarding the Application. The Department's documented concerns centered on the fact that the proposed program did not have the attributes of a new program but rather enhanced an existing program. In addition, the Department's concerns related to the lack of evidence that a new program, even if properly sought, was needed. The Department reasonably determined that the Application appeared to be for a rate increase, that the requested increase was improperly brought as an application for a new program and that there was no showing of need for a new program. Therefore, the Department properly denied the Application in accordance with the rule.

6. Minn. Stat. § 252.46 (2012), now repealed but in place at the time of the application, prohibited development of a new program that primarily results in refinancing of services for individuals already receiving services in existing programs and is therefore an absolute bar to the Department's approval of Opportunity Services' Application.⁵⁷

RECOMMENDATION

IT IS RECOMMENDED that:

1. The Department's denial of the Application be **APPROVED**.
2. Opportunity Services' motion that the Department's denial be reversed or that the matter be remanded for further factual findings be **DENIED**.

Dated: May 7, 2014

s/Barbara J. Case

BARBARA J. CASE
Administrative Law Judge

⁵⁷ Minn. Stat. § 252.46, subd. 4(b) (2012).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64998, St. Paul MN 55164, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Opportunity Services contends that the Department's denial of its Application should be reversed because the Department failed to fulfill the procedural due process requirements for a denial of a Request for a Determination of Need in Minn. R. 9525.0036 when it failed to address each of the seven factors set forth in that rule.

According to that rule the Department must consider seven factors when reviewing an application for a determination of need.

Notwithstanding that the rule does not direct the Department to address each factor in writing, the Department's determination must be "based on objective criteria applied to the facts and circumstances of the record at hand." The rule does not direct the Department to address each factor in writing; however, the Department's discretion is not unlimited. Its reasoning must be explained.⁵⁸ An administrative agency must state the facts and conclusions essential to its decision with clarity and completeness,⁵⁹ and the decision must be supported by substantial evidence which is defined as such

⁵⁸ Carter v. Olmsted County Housing Authority, 574 N.W. 2d 725, 729(1998) (citing, *In re Northwestern Bell Telephone Co.*, 386 N.W. 2d 723, 727 (Minn.1986)).

⁵⁹ Carter v. Olmsted County Housing Authority, 574 N.W. 2d 725, 729(1998) (citing, *People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*, 266 N.W. 2d 858, 871 (Minn. 1978)).

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁶⁰

The Department's February 21, 2013 denial letter passes these tests. Contrary to Opportunity Services' position that the Department's denial was incomplete, the Department provided substantial explanation in its denial letter such that the basis for its decision was transparent and understandable. As found in the denial letter and explained by the Department at the hearing, the Department considered and addressed each factor unless the factor was not of concern or was irrelevant to the application. The Department responded to the request for a needs determination request by giving four reasons why it did not appear to the Department that the Application was actually for a new program.⁶¹ Further, it explained other avenues for Opportunity Services to take to accomplish its goal of more intensive services. The Department also offered to assist the agency in pursuing these alternatives.⁶²

The Department's letter focused on the ways in which the proposal did not meet the characteristics of a new program, but rather appeared to be a request for a rate increase. There are procedures for making such a rate increase request. An Application for a Determination of Need for a new program is not the permissible course of action; determination for a new program was not the appropriate process. In fact, to pursue a rate increase by creating a new program that primarily results in the refinancing of services for individuals already receiving services in existing programs is specifically prohibited under Minnesota law.⁶³

The Department's denial letter would have been more clear had it cited Minn. Stat. § 252.46 (2012) as its underlying basis. However, the letter cited specific reasons why the Department did not believe the Application was actually for a new program and why an application for a new program was not needed. Opportunity Services' argument that this subdivision does not apply to it because the section is titled "new vendors" and it is not a new vendor is supportive of the Department's position, not contrary to it.

Opportunity Services also argues correctly that the legislature cannot have intended to leave existing vendors without recourse when the needs of their consumers increase. Permissible options for Opportunity Services to address their changing client needs do exist. In its denial letter and in testimony at hearing, the Department provided Opportunity Services with a number of options for receiving additional funds to meet their consumers' increased needs.

⁶⁰ Carter v. Olmsted County Housing Authority, 574 N.W. 2d 725, 729(1998) (citing *Soo Line R. Co. v. Minnesota Dep't of Transp.*, 304 N.W. 2d 301, 305-306 (Minn. 1981)) (quotations omitted).

⁶¹ Ex.4, at.31.

⁶² *Id.*, at 32.

⁶³ Minn. Stat. § 252.46, subd. 4 (2012) which states: Nothing in [the subdivision regarding payment rates for new vendors] permits development of a new program that primarily results in refinancing of services for individuals already receiving services in existing programs.

The Department's denial letter provided a sufficient basis for the denial by detailing concerns regarding the expansion of services without a showing of need. Additionally, Opportunity Services sought a rate increase in a manner prohibited by the statute.

B. J. C.